

Competition Between Arbitral Institutions in China – Fighting for a Better System?

By Jie
Zheng

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China International Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMAC) are the best-known international arbitration institutions in China that deal with the resolution of international commercial disputes. There are, however, other arbitral institutions in China that are also empowered to resolve international commercial disputes, by virtue of the Notice of the General Office of the State Council on Several Issues to be Clarified Concerning Implementation of the Arbitration Law of the PRC (Guo Ban Fa [1996] No 22). Article 3 of this instrument provides that other arbitration institutions can also accept foreign-related cases if parties so agree. These institutions are established at municipality level and registered with judicial departments at provincial level; leading examples of these include the Beijing Arbitration Commission (BAC), Shanghai Arbitration Commission, Guangzhou Arbitration Commission, Hangzhou Arbitration and Wuhan Arbitration Commission.

As a result of the recent split between CIETAC and its former Shanghai and Shenzhen sub-commissions, there are now two further independent arbitral institutions: Shanghai International Arbitration Center (SHIAC) and Shenzhen Court of International Arbitration (SCIA).

The rising number of arbitral institutions in China demands that all these institutions provide the highest quality services and procedural rules in order to compete with each other.

The CIETAC split and its aftermath

CIETAC, which has its headquarters in Beijing, has played an important role in resolving cross-border disputes between Chinese and foreign parties since its establishment in 1956. Its sub-commissions are CIETAC Shanghai Sub-Commission, CIETAC South China Sub-Commission, CIETAC Southwest Sub-Commission, CIETAC Tianjin Financial Sub-Commission and CIETAC Hong Kong Arbitration Center.

Jurisdictional disputes arose between CIETAC and its former Shanghai and Shenzhen sub-commissions after CIETAC amended its Arbitration Rules in 2012. The Arbitration Rules of 2012, which took effect on 1 May 2012 (the 2012 Rules), replaced those of 2005 (the 2005 Rules). Article 2(8) of the 2005 Rules gave parties an option to submit disputes to CIETAC, CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission where they had agreed to arbitrate under a general CIETAC arbitration clause. (A general CIETAC arbitration clause is the model clause whereby parties agree to submit disputes to CIETAC for arbitration under the arbitration rules in effect at the time of the submission for arbitration, but which does not specify any sub-commission to which disputes should be referred.)

The 2012 Rules abolished the autonomy of the former CIETAC Shanghai and South China sub-commissions by requiring default administration over all cases under CIETAC arbitration clauses, regardless of whether the place of arbitration was mentioned or not. The 2012 Rules, in the view of the CIETAC Shanghai and South China sub-commissions, negatively influenced their jurisdiction and interests, as a result of which both sub-commissions refused to implement those Rules. CIETAC therefore announced the suspension of its authorisation of these two sub-commissions to accept and administer arbitration cases on 1 August 2012. As a result of this announcement, both sub-commissions jointly announced on 4 August 2012 that they would become independent arbitral institutions, followed this by changing their names. The CIETAC South China Sub-Commission renamed itself dually as the South China International Economic and Trade Arbitration Commission (SCIETAC)/Shenzhen Court of International Arbitration (SCIA) on 22 October 2012. The CIETAC Shanghai Sub-Commission renamed itself as

the Shanghai International Economic and Trade Arbitration Commission (SIETAC)/Shanghai International Arbitration Center (SHIAC) on 11 April 2013. Both adopted their own arbitration rules as a departure from those of CIETAC and created their own panel lists of arbitrators.

As a result of these moves, a number of jurisdictional disputes have arisen between CIETAC and its two former sub-commissions, with parties challenging the jurisdiction of the arbitration commission and, moreover, the validity of the arbitration agreement, by arguing that SHIAC and SCIA are not the designated arbitration commission in arbitration clauses. Under article 16 of the PRC Arbitration Law, a clearly designated arbitration commission is one of the prerequisites of a valid arbitration agreement.

In order to unify interpretations by the people's courts in relation to the recognition of CIETAC-related clauses, the Supreme People's Court issued a binding judicial interpretation on 15 July 2015 (the Judicial Interpretation) aimed at clarifying jurisdiction of CIETAC, SHIAC and SCIA over disputes. The Judicial Interpretation gives clear guidance principally by dividing the cases by reference to three different periods.

These are as follows:

- (1) In cases where arbitration clauses were concluded before the name change of SHIAC and SCIA, these institutions shall have jurisdiction.
- (2) In cases where arbitration clauses were concluded after the name change but before the date of issuance of the Judicial Interpretation, neither institution shall have jurisdiction. If, however, both parties submitted the disputes to SHIAC or SCIA without any objection, the resulting arbitral awards shall be valid and therefore not subject to challenge by either party at the enforcement stage.
- (3) In cases where arbitration clauses were concluded following the Judicial Interpretation and seek to submit disputes to CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission, CIETAC shall have exclusive jurisdiction. There is an exception in that, even after the relevant arbitration commission has confirmed the validity of an arbitration clause and made a decision on its jurisdiction over a dispute, the parties shall still have the right to apply to a people's court to determine the validity of the arbitration clause before the first arbitral hearing, as in ordinary arbitration cases such applications shall be dismissed: reference should be made in this regard to the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the PRC Arbitration Law (Fa Shi [2006] No 7), article 13, paragraph 2, and the Reply of the Supreme People's Court on Several Issues Concerning the Confirmation of the Validity of Arbitration Agreements (Fa Shi [1998] No 27), article 3.

Since the Supreme Court has now confirmed the legal status of SHIAC and SCIA, arbitral awards rendered by these institutions shall be enforced by the people's courts in China. Considering the recent history of the reconstitution and name changes of these institutions, however, the enforceability of their awards in overseas courts is a question yet to be determined. From a practical perspective, CIETAC has a longer history, a higher profile and a more solid reputation with regard to the enforcement of its international arbitral awards. SHIAC and SCIA, by contrast, need to enhance further their international image in the longer term.

A comparison of the latest sets of arbitration rules of major arbitral institutions in China (see comparative table, below)

Arbitral institutions compete with each other by amending their arbitration rules in order to bring them into line with latest developments and best practice of international arbitral institutions overseas. The discussion below of amendments to arbitration rules by three major Chinese arbitration intuitions (CIETAC, SHIAC and BAC) examines how these amendments can better facilitate the settlement of international commercial disputes.

(i) CIETAC

The CIETAC Arbitration Rules 2015 (the 2015 Rules) took effect on 1 January 2015 and replaced those of 2012. Notwithstanding the jurisdictional disputes with its two former sub-commissions, CIETAC is still regarded as an internationally accredited arbitral institution. It therefore continues to provide more flexible and state of the art arbitration rules for ever more complicated patterns of business disputes. The 2015 Rules introduce emergency

arbitration and joinder of additional party procedures, as well as enlarging the scope of application of the rules concerning consolidation of arbitrations. The 2015 Rules also promulgate special provisions for arbitration at the CIETAC Hong Kong Arbitration Center in order to enhance its international image.

(ii) SHIAC

In order to develop as an attractive arbitration institution, SHIAC seized the opportunity of the Shanghai Pilot Free Trade Zone (SFTZ) project (launched on 29 September 2013) to establish the Shanghai Pilot Free Trade Zone Court of Arbitration (SFTZCA) on 22 October 2013, with the aim of better serving parties to commercial disputes arising in the SFTZ. SHIAC also amended both its general Arbitration Rules and the SFTZ Arbitration Rules with effect from 1 January 2015. Moreover, with the co-operation of the China Air Transport Association and the International Air Transport Association, SHIAC established the Shanghai International Aviation Court of Arbitration (SIACA) on 28 August 2014 as an affiliated arbitration court. It is the first arbitral institution established in China to specialise in aviation disputes.

The 2015 editions of the SHIAC Arbitration Rules and the SFTZCA Arbitration Rules incorporate new elements derived from leading international commercial arbitration rules so as to provide for more convenient and efficient arbitration proceedings. For example, both sets of rules introduce modern mechanisms, such as emergency arbitration and consolidation of arbitrations. The SFTZCA Arbitration Rules are even more innovative by virtue of the introduction of *ex aequo et bono* awards, small claims procedures and third party joinder in arbitration proceedings.

(iii) BAC

Beijing Arbitration Commission, one of the most prominent arbitral institutions in China, was established on 28 September 1995. It amended its arbitration rules with effect from 1 April 2015 to meet the needs of increasingly complex and sophisticated business transactions. The BAC Arbitration Rules 2015 (BAC Rules) are a more user-friendly and transparent set of procedural rules. They incorporate new mechanisms, such as joinder of additional parties, consolidation of arbitrations and emergency arbitration. As with the SCIA and SHIAC, the BAC has also registered a new concurrent name, Beijing International Arbitration Center, in order to heighten its international profile.

Concluding remarks

Competition among Chinese arbitral institutions contributes to the development of their arbitration rules in order to serve better the need for dispute resolution services in international commercial transactions. A great number of factors influence party choice of arbitral institutions, such as the transparency and fairness of arbitration rules, the location of arbitral institutions and the possibility of enforcing arbitral awards.

CIETAC, SHIAC and BAC have amended their arbitration rules by introducing modern and internationally accepted mechanisms, such as consolidation of arbitrations, joinder of parties, emergency arbitration and summary proceedings. CIETAC has more detailed rules regarding summary proceedings and consolidation of arbitrations. SHIAC has explored possibilities for greater innovation in its arbitration rules with regard to joinder of third parties, the combination of mediation with arbitration and small claims proceedings. BAC's Arbitration Rules 2015 replace those of 2008 with a view to following international best practice in arbitration.

***Summary of changes to arbitration rules**

The following table summarises the major changes made to the arbitration rules of the three main arbitration institutions discussed, reflecting their adaptation to internationally accepted best practice and standards for the arbitration of business disputes.

| | CIETAC (1 January 2015) | SHIAC/SFTZCA (1 January 2015) | BAC (1 April 2015) |
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| Scope of application | (i) Any disputes are referred to CIETAC and its sub-commissions/arbitration centres and no other arbitration rules are selected; or (ii) parties select CIETAC arbitration rules without designating an arbitral institution.(Article 4) | SHIAC: (i) Parties refer disputes to SHIAC and no other arbitration rules are selected; or (ii) parties choose SHIAC Arbitration Rules without designating an arbitral institution.(Article 3) SFTZCA: (i) Parties refer disputes to SHIAC, the disputes are related to SFTZ and no other arbitration rules are selected; or (ii) parties choose to apply the SFTZCA Arbitration Rules without designating an arbitral institution; or (iii) parties refer disputes to SFTZCA or SIACA; or (iv) parties refer disputes to SHIAC but the arbitration is conducted (or can be inferred to be conducted) in SFTZCA or SIACA. (Article 3) | (i) Any disputes are referred to BAC and no other arbitration rules are selected; or (ii) parties select BAC arbitration rules without designating an arbitral institution(Article 2) |
| Language | In the absence of party choice, the language of arbitration shall be Chinese. Other languages may, however, also be designated by CIETAC. (Article 81) | SHIAC: In the absence of party choice, the language of arbitration shall be Chinese. Other languages may, however, also be designated by the arbitral tribunal on the basis of the mutual agreement of the parties. (SHIAC Article 60; SFTZCA Article 79) | In the absence of party choice, the language of arbitration shall be Chinese and/or any other languages designated by BAC or the arbitral tribunal.(Article 72) |
| Appointment of arbitrators | Parties may appoint not only arbitrators from the panel list but also arbitrators from outside the panel list, subject to confirmation by the Chairman of CIETAC. (Article 26) | SHIAC: Parties can only appoint arbitrators from the panel list.(Article 21) SFTZCA: Parties can also appoint arbitrators from outside the panel list by joint agreement. (Article 27) | Parties may appoint not only arbitrators from the panel list but also arbitrators from outside the panel list, subject to confirmation by the BAC. (Articles 18 and 64(2)) |

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| Consolidation of arbitrations | <p>Consolidation of arbitrations can be made on the application of the parties and upon the approval of CIETAC if the claims in the arbitrations are brought under the same arbitration agreement or under multiple arbitration agreements that are identical or compatible and on condition that either (i) the arbitrations involve the same parties as well as legal relationships of the same nature, or (ii) the multiple contracts involved consist of a principal contract and its ancillary contracts, or (iii) all parties to the arbitrations have agreed to consolidation.(Article 19)</p> | <p>Parties may apply for consolidation of related arbitrations or arbitrations involving the same or the same kind of subject-matter and upon approval by the tribunal. This does not apply, however, where the arbitrators in the tribunals are different. (SHIAC Article 30; SFTZCA Article 36)</p> | <p>Parties may apply for consolidation of arbitrations, subject to approval by BAC. BAC shall take into account the specific circumstances of arbitration agreements on which the relevant arbitrations are based, the nexus between those arbitrations, the stage that each set of arbitration proceedings has reached, the arbitrators already nominated or appointed in the relevant arbitrations and any other relevant factors.(Article 29)</p> |
| Joinder of additional party | <p>Joinder of an additional party may be allowed on the basis of a <i>prima facie</i> view of the arbitration agreement upon approval of the CIETAC, before or after the constitution of the tribunal.(Article 18)</p> | <p>SHIAC: Joinder of a third party which is <i>not</i> a party to the arbitration agreement may be allowed by joint agreement of all the parties and following approval by the tribunal (or the Secretariat, in the absence of the tribunal). (Article 31)</p> | <p>Joinder of an additional party which is party to the arbitration agreement may be allowed before the constitution of the tribunal. No application for such joinder may be made after the constitution of the tribunal unless all parties agree. (Article 13)</p> |
| | | <p>SFTZCA: The rules provide for (i) joinder of an additional party which is a party to the arbitration agreement (Article 37), and (ii) joinder of a third party which is <i>not</i> a party to the arbitration agreement, by joint agreement of all the parties and approval by the tribunal (or the Secretariat in the absence of the tribunal). (Article 38)</p> | |

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| Interim measures(Emergency arbitration) | <p>Application for appointment of an emergency arbitrator may be made before the constitution of tribunal, following acceptance by the arbitration court. The president of the arbitration court shall appoint an emergency arbitrator within 1 day from the receipt of both the application and the advance payment of the costs for the Emergency Arbitrator Procedures. There is a 15-day time limit for rendering decisions on interim measures.(Article 23; Appendix III)</p> | <p>SHIAC: No emergency arbitration is provided for. The arbitral tribunal may order preservation measures after it has been constituted.(Article 18)</p> <p>SFTZCA: Parties may apply for emergency arbitration during the period between acceptance of a case and the constitution of the tribunal, upon the approval of SHIAC. The Chairman of SHIAC shall appoint an emergency arbitrator. There is a 20-day time limit for rendering decisions on interim measures. (Articles 18-24)</p> | <p>After the acceptance of the case and before the constitution of the arbitral tribunal, parties may apply for emergency arbitration upon the approval of BAC.(Article 63)</p> |
| Mediation-Arbitration(Med-Arb) | <p>The tribunal may conduct mediation at the request or by consent of the parties. Where the parties decide to settle, they can either withdraw the arbitration application or request the tribunal either to issue a statement of mediation or render an award based on it. The statement of mediation is only binding on the parties after they have acknowledged receipt of it in writing.(Article 47)</p> | <p>SHIAC: The tribunal may conduct mediation during arbitration proceedings at the request of the parties. Where the settlement is reached through mediation by the tribunal, the parties shall sign a written settlement agreement. The parties may withdraw the arbitration application or request the tribunal to render an award based on the settlement agreement.(Article 41)</p> <p>SFTZCA:Mediation by mediator:After the case has been accepted and before the constitution of tribunal, mediation can be conducted by a mediator who will not participate in arbitration unless otherwise agreed by the parties.(Article 50)</p> <p>Mediation by tribunal:</p> <p>After the constitution of tribunal, the tribunal may mediate during arbitration proceedings upon parties' agreement. (Articles 51)</p> | <p>Mediation by tribunal:The tribunal may conduct mediation at the request or by consent of the parties. Parties can either withdraw the arbitration application or request the tribunal to issue a statement of mediation or render an award. The statement of mediation is binding on the parties after they have acknowledged receipt of it in writing.(Article 42)Mediation by mediator: During the arbitration proceedings, the parties may apply for mediation by mediators of the BAC Mediation Center. Parties may jointly request the tribunal to issue a statement of mediation or render an award based on the conciliation agreement conducted by the mediator. (Article 43)</p> |

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| Summary proceeding | <p>For disputes not exceeding an amount of RMB 5 million, the summary proceeding shall automatically apply. It may also apply to amounts exceeding RMB 5 million on joint application by the parties. There shall be a sole arbitrator. There is a 3-month time limit for rendering awards. (Articles 56-63)</p> | <p>SHIAC: For disputes not exceeding an amount of RMB 1 million, the summary proceeding shall automatically apply. It may also apply to amounts exceeding RMB 1 million on joint application by the parties. There shall be a sole arbitrator. There is a 3-month time limit for rendering awards. (Articles 52-59)</p> | <p>For disputes not exceeding an amount of RMB 1 million, the summary proceeding shall automatically apply. It may also apply to amounts exceeding RMB 1 million on joint application by the parties. There shall be a sole arbitrator. There is a 75- day time limit for rendering awards.(Articles 53-59)</p> |
| | | <p>SFTZCA: For amounts in (i) international disputes not exceeding RMB 1 million, and (ii) domestic disputes of between RMB 100,000 and RMB 1 million, the expedited proceeding shall automatically apply. The expedited proceeding shall also apply to amounts exceeding RMB 1 million in either case, on joint application by the parties. There shall be a sole arbitrator. There is a 3-month time limit for rendering awards.(In domestic cases, disputes involving amounts not exceeding RMB 100,000 shall be subject to the small claims procedure.) (Articles 63-70)</p> | |